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LIBELOUS SPEECH: A SURVIVOR OF *UNITED STEELWORKERS V. SADLOWSKI*?*

The American labor movement provided workers with the hope of matching the economic power and influence of employers in "the battle of trade"¹ that set wages and working conditions. Congressional establishment of the unions' exclusive bargaining authority enabled labor to meet its opponents with a unified economic weapon the individual laborer could not muster.² It also provided an opportunity to test the maxim that "[u]nlimited power corrupts the possessor."³ American experience with the labor movement proved that some union leaders would exercise their authority corruptly.⁴ In the face of increasing evidence of union leader abuses, Congress feared it had exchanged tyranny of the employer for tyranny of the union.⁵ The union threatened rather than achieved the democratic principles Congress had intended it to espouse.⁶

In 1959, Congress adopted the Labor-Management Reporting and Disclosure Act (LMRDA)⁷ to guarantee union members the right to speak and

* First Place, John H. Fanning Labor Law Writing Competition, Columbus School of Law, The Catholic University of America, 1988.

1. *Vegeahn v. Guntner*, 167 Mass. 92, 106, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

2. National Labor Relations Act, § 8, 29 U.S.C. § 158 (1982); Levy, *Legal Responses to Rank-and-File Dissent: Restrictions on Union Officer Autonomy*, 30 BUFFALO L. REV. 663, 666-69 (1981).

3. See William Pitt in FIVE THOUSAND QUOTATIONS FOR ALL OCCASIONS 214 (L. Henry ed. 1945). In a study of union discipline, one researcher discovered seriously vague language in roughly 85% of the constitutions examined. These figures suggested that this vagueness provided unions substantial opportunities to coerce members. Note, *The Role of Outsiders in Elections: United Steelworkers v. Sadlowski*, 69 CORNELL L. REV. 384, 393 n.68 (1984).

4. S. REP. NO. 187, 86th Cong., 1st Sess. 6, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2322.

5. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U.L. REV. 13, 49-50 (1982).

6. Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273, 275 (1962).

7. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (1982)) [hereinafter LMRDA].

assemble⁸ and participate equally in the election process.⁹ At the same time, Congress attempted to minimize federal interference with internal union affairs.¹⁰ The balancing of these competing interests may be most tenuous where the union alleges its members have libeled or slandered its officers or institution.¹¹ The United States Constitution does not protect all false speech;¹² arguably, such speech deserves no greater protection in the labor union context.¹³ However, federal courts have routinely tolerated union members' incautious, hyperbolic, and malicious accusations of union leader wrongdoing.¹⁴ In 1982, the United States Supreme Court threatened the courts' tolerant approach by applying a rational basis test to a union rule that narrowed the free speech rights of union members.¹⁵ In the aftermath of *United Steelworkers v. Sadlowski*,¹⁶ commentators have asked whether the rational basis test would eviscerate federal protection of members from discipline for libelous speech.¹⁷ The Court has yet to address the question, but the lower courts continue to adhere to the pre-*Sadlowski* view of the free speech guarantee.¹⁸

This Comment will examine the ambiguous legislative history of the Labor-Management Reporting and Disclosure Act's free speech guarantees. It will then discuss the broad protection provided to libelous speech. The *Sadlowski* approach of minimal scrutiny will be evaluated, and the argument will be made that rational basis scrutiny undermines the protections of members' dissent. The Comment will argue that, under the LMRDA, the proper balancing of workers' rights and union autonomy requires protection of even libelous speech. It will conclude that *Sadlowski*'s narrow holding does not undermine such protections.

8. *Id.* § 101(a)(2), 29 U.S.C. § 411(a)(2) (1982).

9. *Id.* § 101(a)(1), 29 U.S.C. § 411(a)(1) (1982).

10. S. REP. NO. 187, *supra* note 4, at 7, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2323. The Senate Labor Committee opposed "any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing . . ." *Id.*

11. See Summers, *supra* note 6, at 287.

12. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

13. Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 592 (1973).

14. See *id.* at 592 n.75.

15. *United Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982).

16. 457 U.S. 102 (1982).

17. See, e.g., Bartosic & Minda, *Labor Law Myth in the Supreme Court, 1981 Term: A Plea for Realistic and Coherent Theory*, 30 UCLA L. REV. 271, 318 n.276 (1982).

18. See, e.g., *Petramale v. Local No. 17 of Laborers Int'l Union*, 736 F.2d 13 (2d Cir.), cert. denied, 469 U.S. 1087 (1984).

I. LMRDA: A BILL OF RIGHTS FOR UNION MEMBERS

The National Labor Relations Act (NLRA)¹⁹ affirmatively protected and encouraged the organization of unions²⁰ when "it made the majority union the sole bargaining agent, vesting in it exclusive power to represent all employees in the bargaining unit. Employers were not only compelled to bargain with the majority union but also prohibited from bargaining with individuals or minority groups."²¹ This power, like the legislative power of an intermediate level of government, "transformed the demand for union democracy into legislative imposition of democratic standards."²²

Congress, after extensive hearings to investigate labor union practices,²³ determined that union democracy had suffered at the hands of a few abusive union leaders who had exercised their exclusive bargaining power for personal gain²⁴ and in disregard of union members' will.²⁵ The congressional investigations culminated in legislative efforts to deter such improper conduct by union officials.²⁶ The reforms were not, however, undertaken to place unions under federal oversight. Congress continued to recognize the need for internal union autonomy.²⁷ Congress expressed its continued support for the legislative model of union democracy by considering a "Bill of Rights" for union members.²⁸

19. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended in scattered sections of 29 U.S.C.).

20. Summers, *supra* note 6, at 277.

21. *Id.*

22. *Id.*

23. Note, *supra* note 3, at 389 n.36.

The Senate Select Committee on Improper Activities in the Labor or Management Field held investigatory hearings from 1957 to 1960 to study abuses in the labor field. The Committee was popularly known as the McClellan Committee because it was chaired by Senator John McClellan (D. Ark.). During its existence, the Committee held 270 days of public hearings and amassed 46,150 pages of record. The Committee heard 1,526 witnesses and issued 8,000 subpoenas. Three hundred forty-three witnesses declined to answer Committee inquiries by invoking the fifth amendment privilege against self-incrimination.

Id. (citing J. MCCLELLAN, *CRIME WITHOUT PUNISHMENT* 208 (1962)).

24. S. REP. NO. 187, *supra* note 4, at 6, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2322; see also Local No. 82, Furniture & Piano Moving v. Crowley, 467 U.S. 526, 536 (1984).

25. Levy, *supra* note 2, at 680.

26. S. REP. NO. 187, *supra* note 4, at 2, 5, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2321.

27. *Id.* at 5, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2322.

28. The American Civil Liberties Union (ACLU) first recommended adoption of a bill of rights to protect member rights. Atleson, *A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 MINN. L. REV. 403, 446 n.109 (1967). The ACLU Bill of Rights would have "equated the freedom of speech sought by the ACLU with freedom of speech under the Constitution." *Id.* at 446 n.109.

The first version of the Labor-Management Reporting and Disclosure Act of 1959, however, omitted a bill of rights.²⁹ During floor debate of the LMRDA, Senator McClellan proposed a bill of rights to assure greater participatory democracy.³⁰ The Senate Labor Committee had originally rejected this bill of rights, but the full Senate passed it by a single vote.³¹ The original version provided every union member

'shall have the right to express any views, arguments, or opinions regarding any matter respecting such organization or its officers, agents, or representatives, and to disseminate such views, arguments, or opinions either orally or in printed, graphic, or visual form, without being subject to penalty, discipline, or interference of any kind by such organization.'³²

Weak labor union lobbyists³³ faced the inevitability of the bill of rights but worked to prepare a narrower provision. Three days after the adoption of the McClellan bill, the Senate replaced it with the Kuchel proposal.³⁴ After adoption of the bill of rights, "[t]he central thrust of the [LMRDA] was no

29. Note, Finnegan v. Leu: *Promoting Union Democracy by Suppressing Internal Dissent*, 32 CATH. U.L. REV. 287, 290 (1982). Senators Kennedy and Ives originally introduced the LMRDA. *Id.* at 287 n.2. The original provisions sought to provide "the opportunity to influence policy and leadership by free and periodic elections" and reporting of union activities. S. REP. NO. 187, *supra* note 4, at 7, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2323; see also Summers, *supra* note 6, at 274; Note, *supra*, at 290.

30. Note, *supra* note 29, at 287 n.3, 290.

31. *Id.* at 287 n.3. "The McClellan 'bill of rights' was adopted by the narrowest of margins—47-46 with five abstentions." Beaird & Player, *supra* note 13, at 579. In fact, the Vice President cast the deciding vote. Petition for a Writ of Certiorari at 22 n.35, *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) (No. 81-395) (LEXIS, Genfed library, Briefs file).

32. Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226, 231 (1959) (quoting 105 CONG. REC. 5810 (daily ed. Apr. 22, 1959)). One commentator has described the provision as an unqualified grant of rights exceeding the scope of the federal Constitution. *Id.* at 231.

33. Levy, *supra* note 2, at 681. The unions may have underestimated the support for labor reforms. Certainly, they found it difficult to refute the findings of the McClellan Committee regarding undemocratic procedures. Their prior public support of the ideology of democracy made strong objections to member rights untenable. These weaknesses may have contributed to the unions' inability to negotiate a satisfactory compromise. *Id.*

34. Note, *supra* note 29, at 287 n.3. Section 101(a)(2) provides in relevant part:

Every member of any labor organization shall have the right . . . to express any views, arguments or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2) (1982).

longer the prevention of financial malpractices but the protection of union democracy."³⁵ The House of Representatives adopted the Kuchel provision with almost no discussion.³⁶ The final version, in section 101(a)(2), contained a broad grant of the right "to express any views, arguments or opinions" subject to a proviso permitting unions to "enforce reasonable rules" promoting member responsibility to the union and performance of union legal and contractual obligations.³⁷ The quick approval of the bill of rights provided courts little guidance as to the proper interpretation of the free speech guarantee and proviso.³⁸

Parallels have been drawn between the section 101(a)(2) free speech guarantee and the Bill of Rights.³⁹ However, commentators differ as to whether section 101(a)(2) actually guarantees the equivalent of federal freedom-of-speech guarantees in light of the section's proviso regarding union authority to adopt reasonable rules to regulate speech.⁴⁰ The case law indicates that first amendment principles influence construction of section 101(a)(2) without controlling the provision's scope.

II. JUDICIAL INTERPRETATIONS OF SECTION 101(A)(2)

A. *Salzhandler v. Caputo: Protecting Speech Beyond the Scope of the First Amendment*

The Second Circuit established the broadest reach for section 101(a)(2)'s protection of union member speech in *Salzhandler v. Caputo*.⁴¹ In *Salzhan-*

35. Summers, *supra* note 6, at 274.

36. Note, *supra* note 29, at 287 n.3.

37. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1982).

38. Atleson, *supra* note 28, at 409; Summers, *supra* note 6, at 284. One commentator has recommended that courts interpreting the provision "seek out the underlying rationale [of the statute] without placing great emphasis upon close construction of the words." Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 852 (1960). Others have concluded that "the courts should apply standards analogous to those used in protecting constitutional rights." Summers, *supra* note 6, at 284; *see also* Atleson, *supra* note 28, at 404 (noting a "marked parallel between the rights granted and the federal Bill of Rights"); Beaird & Player, *supra* note 13, at 580 ("[T]he underlying purpose of Title I is to equate the voice of union members in the affairs of labor organizations with the voice of the public in governmental affairs."); Hall, *Freedom of Speech and Union Discipline: The Implications of Salzhandler*, 17 N.Y.U. ANN. CONF. ON LABOR 349, 355 (1964) (quoting 105 CONG. REC. 6472, 6476, 6478 (daily ed. Apr. 22, 1959) (statement of Sen. McClellan)) ("['W]e should give union members their inherent constitutional rights and . . . protect union members in those rights.'"); Hickey, *supra* note 32, at 226; Levy, *supra* note 2, at 684 ("Congress simply intended to apply the Bill of Rights in the United States Constitution to the activities of the participants in union government."). *But see infra* notes 88-89 and accompanying text.

39. *See supra* note 38.

40. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1982).

41. 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963).

der, a member and financial secretary of Local 442 of the Brotherhood of Painters, Decorators and Paperhangers of America had distributed leaflets accusing the local's president of making derogatory remarks about other members, converting widows' dues-refund checks, and misappropriating the local's funds.⁴² The local's president filed charges against Salzhandler, under the union's constitution, for libel and slander constituting " 'acts and conduct inconsistent with the duties, obligations and fealty of a member or officer of the Brotherhood.' " ⁴³ A five-person trial board found Salzhandler guilty, removed him from office, and barred him from *all* participation in union meetings and affairs for a five-year period.⁴⁴ Salzhandler filed suit for nullification of the order, reinstatement, and damages, but the district court dismissed his complaint because it found his remarks libelous.⁴⁵ The Second Circuit reversed and held that "Salzhandler had a right to speak his mind and spread his opinions regarding the union's officers, regardless of whether his statements were true or false."⁴⁶

In deciding the case, the court gave section 101(a)(2) a broader scope than first amendment protections established in *Beauharnais v. Illinois*.⁴⁷ The Court in *Beauharnais*, determined that libelous speech urging whites to unite against blacks was outside the scope of the first amendment.⁴⁸ The *Salzhandler* court distinguished the LMRDA free speech protection in light of the practical realities of union politics.

The court examined the legislative history of section 101(a)(2) of the LMRDA. It read the provision as a broad protection of all discussion, criticism, and complaint.⁴⁹ Congress had subjected this broad protection of speech to two explicit exceptions: the union could establish reasonable rules relating to members' responsibilities to the union as an institution and to the union's legal and contractual obligations.⁵⁰ The court supported its literal interpretation of the 101(a)(2) proviso with its reading of the legislative history.⁵¹

42. *Id.* at 447.

43. *Id.* at 448.

44. *Id.*

45. *Id.*

46. *Id.* at 451.

47. 343 U.S. 250, 266 (1952), *overruled*, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

48. *Id.*

49. *Salzhandler*, 316 F.2d at 448-49. The role of publicity as a deterrent to wrongdoing has been applauded by Justice Brennan who calls it " 'a remedy for social . . . diseases.' " Note, *supra* note 3, at 394 n.73 (quoting L. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1933)).

50. *Salzhandler*, 316 F.2d at 450.

51. The court viewed Senator McClellan's proposed version as absolute and the enacted

In addition, the court's opinion reflected an awareness of the practical obstacles that face a critic of union activity. The court acknowledged that *Beauharnais* left open the question of protection of libelous speech in the absence of an impartial hearing by a judge.⁵² The court openly questioned the impartiality of the union trial board where its members appreciated the institution's concern for unity more than they appreciated "the fine line between criticism and defamation."⁵³ The *Salzhandler* court voiced its reluctance to subject each charged party to a de novo trial of the libel claim in federal court absent congressional intent.⁵⁴ Union trial boards evaluating allegations of libel might well have penalized what the court termed "'overstated accusations'" and common "'vitriol.'"⁵⁵ The court considered the overbroad application of libel rules a tool to suppress revelations of corrupt

version as a specific listing of exceptions to a broad rule. *Id.* The court dismissed language by Senator McClellan that characterized his initial proposal as a qualified grant of rights. *Id.* at 450 n.8. Senator Kuchel had stated that under his proposal speech would remain subject to "'reasonable restraints.'" Atleson, *supra* note 28, at 451 (quoting 2 LEG. HIST. 1231). Senator McClellan may have meant that union member speech remained subject to the same type of balancing as speech protected by the first amendment without implying that all first amendment principles applied under the proviso to § 101(a)(2). Certainly, Senator McClellan voted for the Kuchel version. Petition for Writ of Certiorari at 21 n.34, *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) (No. 81-395) (LEXIS, Genfed library, Briefs file).

52. *Salzhandler*, 316 F.2d at 449-50 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 263-64 (1952), *overruled*, *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

53. *Id.* at 450. The court's opinion acknowledged that unions generally lack an independent judiciary to hear disciplinary charges. *See generally* Hartley, *supra* note 5, at 68 (discussing rare instances of independent public review). In addition to their interest in the dispute's outcome, union trial-board members generally lack legal training. Atleson, *supra* note 28, at 448.

54. *Salzhandler*, 316 F.2d at 450. Critics of the *Salzhandler* decision have emphasized that the court's line-drawing to protect libel rather than submit constitutionally protected speech to biased tribunals ignores the multiplicity of difficult issues the tribunals decide. *See, e.g.*, Atleson, *supra* note 28, at 469 ("[T]he line between dual unionism and responsible criticism of union policies is also difficult, yet Congress was aware that union tribunals are composed of laymen."). Indeed, critics question the court's conclusion that Congress did not foresee de novo federal review of libel disciplinary changes. *Id.* "After a member has been disciplined for 'libel,' the court is free to review the facts and determine as a matter of law whether the statement constituted libel and if so, whether it was privileged." Beaird & Player, *supra* note 13, at 592. Nevertheless, the union's ability to discipline where it suspects libel has occurred provides unions an opportunity to stigmatize critics for legitimate speech. The deterrent value of an initial finding of guilt may not be offset by vindication that follows exhaustion of internal remedies and, perhaps, exhaustion of the charged party. *See* Atleson, *supra* note 28, 453-54.

55. *Salzhandler*, 316 F.2d at 450 n.7 (quoting Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273, 287 (1962)). *New York Times v. Sullivan*, 376 U.S. 254 (1964), which established a qualified protection of libel and replaced *Beauharnais*, recognized that open debate requires protection of some questionable remarks. *Id.* at 271-72. Atleson has examined the "overprotection" free speech rights required to secure against overbreadth and chill of protected speech. Atleson, *supra* note 28, at 449.

union administration.⁵⁶

The court rejected the defendants' argument that the section 101(a)(2) proviso required balancing of the union's interest in preventing false accusations of union corruption and officer wrongdoing. The defendants had alleged that false accusations undermined member support of the union and weakened the union's bargaining position with the employer.⁵⁷ Based on a narrow reading of the proviso, the court reasoned that Congress had weighed the need to protect the institution's bargaining position against the members' speech rights and struck the balance in favor of the members' rights.⁵⁸ The court recognized, however, that section 101(a)(2) had not dis-

56. *Salzhandler*, 316 F.2d at 450-51. Critics point out that judge-bias arguments would stymie internal adjudication of all disciplinary matters. Sigal, *Freedom of Speech and Union Discipline: The "Right" of Defamation and Disloyalty*, 17 N.Y.U. ANN. CONF. ON LABOR 367, 374 (1964). Indeed, some authors suggest that federal legislation requiring independent trial boards would better secure union members' rights. Hartley, *supra* note 5, at 67-68. These commentators recognize, as the McClellan Committee did, that national officers use their powers to "curb dissent" and "quiet critics." *Id.* at 67. Appeals of tribunal decisions at national conventions rarely meet with success. *Id.* The union tribunal system often serves "as simply an additional forum for the exercise of power." Levy, *supra* note 2, at 668 (footnote omitted).

57. See *Salzhandler*, 316 F.2d at 450-51. The union's argument that libel of union officers undermines the institution may exaggerate the effect of the attack. In 1968, the Second Circuit addressed the issue of whether claims of misappropriation attack the union itself. In *Giordani v. Upholsterers Int'l Union*, 403 F.2d 85 (2d Cir. 1968), the court held that "only officials can misappropriate funds; therefore the speech, in reality, accused only officials of the union and not the union itself." Beaird & Player, *supra* note 13, at 594. Consistent with *Salzhandler*, the court rejected the libel complaint as being outside the scope of the § 101(a)(2) proviso. *Id.*

Critics of *Salzhandler's* reasoning sometimes agree with its results. For example, Atleson notes that:

[I]t is doubtful whether the union's bargaining strength was affected. The remarks were apparently not made in the midst of an organizational or election campaign, and certainly the remarks did not relate to any such campaign. Furthermore, it is highly doubtful that *Salzhandler*, an officer, intended to undermine the union as an institution as opposed to undermining Webman's position as president. Furthermore, *Salzhandler's* remarks related to financial irregularities, which like corruption, were the kind of expression thought crucial by Congress. Whether true or false, a strong showing of institutional harm should be required to justify punishing this kind of expression. '[T]he Act was designed largely to curtail such vices as the mismanagement of union funds, criticism of which by union members is always likely to be viewed by union officials as defamatory.'

Atleson, *supra* note 28, at 464 (footnote omitted) (quoting *Salzhandler*, 316 F.2d at 451); see also *id.* at 448 (arguing that protected scope exceeds areas of original congressional concern).

58. *Salzhandler*, 316 F.2d at 451. The Second Circuit's position seems unequivocal: "the desirability of protecting the democratic process within the unions outweighs any possible weakening of unions in their dealings with employers which may result from the free expression of opinions within the unions." *Id.* Benjamin Sigal, General Counsel, International Union of Electrical Radio and Machine Workers, relates the union view of this sweeping declaration as to congressional intent when he questions whether *Salzhandler* would protect speech even if it "destroy[s] the effectiveness of the economic unit." Sigal, *supra* note 56, at 374. Other critics challenge the court's opinion by questioning its conclusion that legislative

turbed state remedies for libel.⁵⁹

Despite criticisms of the Second Circuit's broad view of section 101(a)(2) and narrow view of its proviso, "*Salzhandler* has been religiously followed."⁶⁰ One of the criticisms of *Salzhandler* is that its holding ignores modern developments in libel law. The Supreme Court's decision in *New York Times v. Sullivan*⁶¹ came after the decision in *Salzhandler*. Despite its critical contribution to the body of federal constitutional law relating to libel,⁶² *Sullivan* has not significantly affected interpretations of section 101(a)(2).⁶³

B. *New York Times v. Sullivan: The Broad View Survives Changes in Constitutional Libel Law*

The Court's decision in *Sullivan* refined federal constitutional law without affecting judicial interpretation of section 101(a)(2) protections of libelous speech.⁶⁴ Whereas *Beauharnais* denied constitutional protection to all libelous speech, *Sullivan* recognized a qualified privilege for libel.⁶⁵ The *Sullivan* Court required a plaintiff who was a "public official" to prove the speech was "'of and concerning' the plaintiff" and motivated by actual malice.⁶⁶ The Court supported its stringent requirements in light of a compel-

history supports the conclusion that Congress meant only to permit restrictions on member speech in the two delineated areas. Atleson, *supra* note 28, at 450, 452.

59. *Salzhandler*, 316 F.2d at 451.

60. Beaird & Player, *supra* note 13, at 592 (citing *Fulton Lodge No. 2, IAM v. Nix*, 415 F.2d 212 (5th Cir. 1969); *International Bhd. of Boilermakers v. Rafferty*, 348 F.2d 307 (9th Cir. 1965); *Cole v. Hall*, 339 F.2d 881 (2d Cir. 1965); *Robins v. Schonfeld*, 326 F. Supp. 525 (S.D.N.Y. 1971); *Sheridan v. Liquor Salesman Local 2*, 303 F. Supp. 999 (S.D.N.Y. 1969); *Archibald v. Operating Eng'rs Local 57*, 276 F. Supp. 326 (D.R.I. 1967); *Gartner v. Soloner*, 220 F. Supp. 115 (E.D. Pa. 1963); *Stark v. Carpenters Dist. Council*, 219 F. Supp. 528 (D. Minn. 1963)). Courts that have been willing to draw a line with the § 101(a)(2) proviso have required proof that the union itself suffered. *Id.* at 594. Unions have not found reliance on the proviso provides an effective ground for discipline of member libel. *Id.*

61. 376 U.S. 254 (1964).

62. *Sullivan* overruled *Beauharnais*, and created a qualified privilege for libel.

63. Beaird & Player, *supra* note 13, at 592-93 & n.76 (citing *Cole v. Hall*, 462 F.2d 777 (2d Cir. 1972), *aff'd on other grounds*, 412 U.S. 1 (1973); *Giordani v. Upholsterers Union*, 403 F.2d 85 (2d Cir. 1968); *Cole v. Hall*, 339 F.2d 881 (2d Cir. 1965); *Archibald v. Operating Eng'rs Local 57*, 276 F. Supp. 326 (D.R.I. 1967)) (courts apply *Salzhandler* and ignore *Sullivan* even where actual malice is proven).

64. *Id.* at 592-93.

65. *Sullivan*, 376 U.S. at 279-80.

66. *Id.* at 267. The definition of public official in *Sullivan* and its progeny poses no problem for the union member who libels an elected union official such as the local president in *Salzhandler*. See *id.* at 283 n.23. Nor should it restrict application of *Sullivan* to a candidate for union office. See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971) (candidate for elective office is public official). One area of concern may be the matter of the appointed union official. Appointees are neither elected, as in *Sullivan*, nor candidates as in *Monitor Patriot*.

ling state interest in " 'the opportunity for free political discussion' " ⁶⁷ that is "uninhibited, robust, and wide-open, and that may . . . well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." ⁶⁸ The concerns the Court expressed mirror the concerns of the *Salzhandler* court that " 'vitriol and calumny' " require protection in the context of union debates. ⁶⁹ The *Sullivan* Court noted that false statements may require protection to give debate the " 'breathing space' " it requires to thrive. ⁷⁰ In the labor context, this protection may require even greater breathing space because union debates are characteristically heated and often vulgar. ⁷¹ As in *Salzhandler*, the *Sullivan* Court recognized that drawing the lines too narrowly creates an incentive for people to " 'steer far wider of the unlawful zone,' " ⁷² dampening debate. ⁷³ The Court acknowledged that the line between protected and unprotected speech remains indistinct and emphasized the Court's need to "in proper cases review the evidence to make certain that those principles have been constitutionally applied." ⁷⁴

Based on observations that section 101(a)(2) imitates the Bill of Rights, it seems reasonable to apply *Sullivan* in LMRDA libel situations. ⁷⁵ Although courts have yet to explicitly reject *Sullivan* in that context, they continue to apply *Salzhandler's* broader protections. ⁷⁶ Those who advocate application of the *Sullivan* test recognize its capacity for favoring union discipline. However, Atleson argues that *Sullivan's* holding would not change the result

However, *Garrison v. Louisiana*, 379 U.S. 64 (1964), may shed light on this question where it points out that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Id.* at 74-75. *Garrison* emphasized that criticism of an official's conduct of business was of public concern. *Id.* at 76-77.

The Court's definition of actual malice in *Sullivan* encompasses knowingly false and recklessly false statements. *Sullivan*, 376 U.S. at 280.

67. *Sullivan*, 376 U.S. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

68. *Id.* at 270 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

69. *Salzhandler v. Caputo*, 316 F.2d 445, 450 n.7 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (quoting Summers, *American Legislation for Union Democracy*, 25 MOD. L. REV. 273, 287 (1962)). Segments of the Painters' union have a history of hard-fought battles and internal disputes likely to produce a plethora of "libel and slander" claims in the absence of a rule such as the one in *Salzhandler*. Under these circumstances, "heated or 'fighting' words" may have little impact on the institution. Atleson, *supra* note 28, at 462-63.

70. *Sullivan*, 376 U.S. at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

71. *Semancik v. UMW*, 466 F.2d 144, 154 (3d Cir. 1972) ("[L]anguage which would otherwise be characterized as extremely robust is often an accepted part of union life.").

72. *Sullivan*, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

73. *Id.*

74. *Id.* at 285.

75. See Beaird & Player, *supra* note 13, at 592.

76. *Id.* at 593.

if applied in the *Salzhandler* context.⁷⁷ He argues that the *Sullivan* rule for public officials analogizes well to union officials and would protect many libelous remarks.⁷⁸ He also suggests extending the public official analysis to union policy questions because the same values warrant free and open debate in that area.⁷⁹ Beaird and Player suggest that application of *Sullivan* principles in section 101(a)(2) cases would parallel the National Labor Relations Board's (NLRB) application of *Sullivan* in libel claims between employers and unions under the NLRA.⁸⁰

Despite these arguments, *Sullivan* and the NLRB case law do not resolve the *Salzhandler* court's concern that a biased and untrained tribunal will exercise its discretion to limit criticism and dissent. Even the NLRB analogy seems unpersuasive because the Board offers parties a full hearing before an impartial administrative law judge.⁸¹ Additionally, in the NLRB context, a successful party must file a federal suit in appellate court to enforce the NLRB's order.⁸² In contrast, imposition of union discipline precedes judicial review.⁸³ A court may later overturn wrongful disciplinary action, but the interim effects of such action may stigmatize the union member, chilling the dissent of other members.⁸⁴ In *Salzhandler*'s case, the union notified him of his removal from office at the same time it notified other union members, thereby sending them the same harsh message.⁸⁵ The exclusion of *Salzhandler* from attendance and participation at all union meetings for a five-year period could effectively silence critics of an election, a dues vote, or a contract renewal whether or not the member later returned, vindicated of the charge.⁸⁶ Member apathy makes it unlikely that the absent union member will keep an issue alive. The one-party nature of union politics serves to disenfranchise dissenters unable to keep their message before the membership.⁸⁷

77. Atleson, *supra* note 28, at 447.

78. *Id.* at 448-49 & n.118.

79. *Id.* at 449 n.118.

80. Beaird & Player, *supra* note 13, at 591 (discussing *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966)).

81. *See* 29 U.S.C. § 160(b) (1982).

82. *Id.* § 160(e).

83. *See Salzhandler v. Caputo*, 316 F.2d 445, 448 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963).

84. *Id.*

85. *Id.*

86. *See generally id.* at 450.

87. Levy, *supra* note 2, at 670. In a "one-party" system, incumbents command the resources to avoid many challenges to their authority. Incumbents command all of the forums of power within the union, permitting them to use disciplinary proceedings to carry out their objectives. *See Note, supra* note 29, at 308-09. They also control the means to communicate

Another criticism of *Salzhandler* after *Sullivan* is that *Sullivan*'s recognition of a qualified libel privilege recognizes the valid, compelling interests of the victim of libel.⁸⁸ Detractors argue that "unions do have a valid institutional interest in preventing libel of officials, particularly when the remarks meet the actual malice standard."⁸⁹ This argument remains subject to the Second Circuit holding that libel of a union official is not libel of the union as an institution.⁹⁰ As the Court opined in *Sullivan*, injury to official reputation does not justify suppression of speech any more than does factual error.⁹¹ The impartial application of *Sullivan* would only produce a different result in those cases where the union proved actual malice.

Another criticism of *Salzhandler* is that its emphasis of state libel remedies improperly ignores congressional support of an independent union tribunal. As the Second Circuit noted in another LMRDA case, "[t]he congressionally approved policy of first permitting unions to correct their own wrongs is rooted in the desire to stimulate labor organizations to take the initiative and independently to establish honest and democratic procedures."⁹² In fact, the Second Circuit has expressed appreciation for the valuable assistance union tribunals' decisions provide.⁹³ Despite such views, the *Salzhandler* approach better meets the LMRDA goal of limiting federal interference in union affairs by removing malice claims from the union's purview.⁹⁴

Although *Sullivan* has reformed first amendment treatment of libel, it has yet to influence section 101(a)(2). It seems that judicial concerns about union tribunal fairness continue to warrant judicial review of all union libel cases.

III. JUDICIAL INTERPRETATIONS OF THE SECTION 101(A)(2) PROVISIO

A. *United Steelworkers v. Sadlowski: Providing for the Proviso*

By far, the most threatening challenge to *Salzhandler*'s protection of maliciously libelous speech is the 1982 case of *United Steelworkers v. Sadlowski*.⁹⁵

only that information they want members to have and to withhold that which provides them no advantages. Note, *supra* note 3, at 392.

88. Comment, "Outsider" Contributions to Union Candidates: *United Steelworkers v. Sadlowski*, 68 IOWA L. REV. 831, 843 (1983).

89. *Id.* at 841 (footnote omitted).

90. See *supra* note 57.

91. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964).

92. *Detroy v. American Guild of Variety Artists*, 286 F.2d 75, 79 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961) (citation omitted).

93. *Id.*

94. Summers, *supra* note 6, at 279; see also Atleson, *supra* note 28, at 463.

95. 457 U.S. 102 (1982). The Court's decision was five to four. *Id.* at 102.

In *Sadlowski*, the Supreme Court addressed the scope of the section 101(a)(2) proviso in the context of deciding whether unions could bar the use of nonmember campaign contributions.⁹⁶ The Court gave the proviso its broadest reading when it upheld the union's regulation under a rational basis test.⁹⁷

In *Sadlowski*, the Court upheld a union rule prohibiting union candidates from accepting campaign contributions by nonmembers.⁹⁸ The Court rejected arguments that nonmember contributions provided essential support to insurgents, and accepted the argument that the union's goal of preventing nonmembers' interference with union activities was reasonable.⁹⁹ The *Sadlowski* Court developed a two-part analysis of section 101(a)(2) issues: first, does the union rule interfere with a protected free speech interest; and, second, if so, is the rule reasonable under the proviso.¹⁰⁰ In supporting this analytical framework, the Court evaluated section 101(a)(2)'s legislative history. Unlike the *Salzhandler* court, however, the *Sadlowski* Court recognized a more equivocal commitment to provide union members with " 'some of the freedoms . . . that we enjoy as citizens by virtue of the Constitution of the United States.' " ¹⁰¹ The critical aspect of the Court's opinion was its handling of the second prong of the analysis. The Court contrasted first amendment strict scrutiny review with the union context's reasonability test.¹⁰² Thus, the Court ruled that "there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment."¹⁰³ The Court concluded that the language of the section 101(a)(2) proviso reinforced its analysis of congressional intent.¹⁰⁴ Incongruously, the Court continued its analysis assuming that its reading comported with the democratic ideals Congress envisioned for labor unions.¹⁰⁵ This assumption ignored the likelihood that a union would provide

96. *Id.* at 104.

97. *See id.* at 104, 111.

98. *Id.* at 104-05.

99. *Id.* at 111-19.

100. *Id.* at 111.

101. *Id.* at 110 (quoting 105 CONG. REC. 6472 (1959), 2 LEGIS. HIST. 1098) (statement of Sen. McClellan) (emphasis added). The Court noted that first amendment principles helped in construing the first prong of the test but did not control in interpreting § 101(a)(2). *Id.* at 111.

102. *Id.* at 111.

103. *Id.*

104. *Id.*

105. The Court indicated that Congress had emphasized the need "to discuss union policies and criticize the leadership without fear of reprisal" but that it had emphasized these rights "in the context of election campaigns." *Id.* at 112. Nevertheless, the Court applied the rational basis test in an election context because Congress had intended the proviso "to ensure that the scope of the statute was limited by a general rule of reason." *Id.* at 111 n.4.

a satisfactory purpose for any rule it promulgated.¹⁰⁶ As with most applications of the rational basis test,¹⁰⁷ the Court found the union rule "reasonably related to the protection of the organization as an institution."¹⁰⁸

Unlike *Salzhandler*, which interpreted section 101(a)(2), *Sadlowski* turned on interpretation of the proviso. The *Sadlowski* holding broadly protects unions and arguably makes irrelevant holdings such as *Salzhandler* which broadly define protected rights.¹⁰⁹ This result does not satisfy the congressional intent behind the "reasonable rules" proviso.¹¹⁰ Had Congress intended to pass such inadequate protection of union member rights, it would not have passed the Kuchel proposal, without debate, barely three days after the passage of the McClellan version.¹¹¹ Neither would the provision have received McClellan's support.¹¹² Additionally, a Congress committed to protecting institutional interests would have required the Secretary of the Department of Labor to enforce union members' complaints of reprisal for

106. Levy, *supra* note 2, at 693-94.

107. Comment, *supra* note 88, at 845. Most applications of a rational basis test "tend to lead inevitably to the same result, any union rule will meet the standard, and the substantive rights protected by the main part of section 101(a)(2) in fact will not be protected." *Id.* (footnote omitted).

108. *Sadlowski*, 457 U.S. at 112. "A rational basis standard requires that the means used be rationally related to the furtherance of a legitimate interest." Comment, *supra* note 88, at 834. The union alleged it "adopted the rule because it wanted to ensure that nonmembers do not unduly influence union affairs." *Sadlowski*, 457 U.S. at 115. The Court determined that purpose satisfied congressional intent in passing the LMRDA. *Id.* at 116. In addition, the Court noted that "the interference with interests protected by § 101(a)(2) is only partial." *Id.* at 114 n.7.

109. See *supra* note 107.

110. See *supra* note 34. One author's examination of the legislative history suggests proponents of the Kuchel version assured the McClellan supporters this result would not occur. Comment, *supra* note 88, at 844-46. But see *id.* at 846 (arguing that Congress did intend "broader exceptions" when it adopted the Kuchel amendment to better protect institutional interests); see also *id.* at 847-49 (recommending use of an intermediate scrutiny in § 101(a)(2) cases). The *Sadlowski* view suggests that the legislative intent behind the LMRDA was to increase union authority over members, not union member rights. This view is at odds with the statements of the bill's proponents. See Note, Local 82, Furniture Moving Drivers v. Crowley: *A Restatement of Institutional Power Under Titles I and IV of the LMRDA*, 34 CATH. U.L. REV. 181, 182 n.6 (1984).

111. See *supra* text accompanying notes 34-36.

112. See *supra* note 51. When Senator McClellan referred to the need for reasonable limits he referred to the type of limits "relating to equal rights and free speech and assembly . . . implicit in the bill of rights as originally drafted, just as [they are] implicit in the Bill of Rights in the Federal Constitution to prevent abuses." Atleson, *supra* note 28, at 451 (quoting 2 LEG. HIST. 1294 (statement of Sen. McClellan)). These limits, by analogy to first amendment limits, would have to survive strict scrutiny analysis. See *United Steelworkers v. Sadlowski*, 457 U.S. 102, 111 (1982).

critical speech.¹¹³ The Secretary likely would have provided a more supportive review than the courts have provided to date.¹¹⁴ Instead, Congress gave members a private right of action to more effectively enforce their rights.¹¹⁵ In addition, the overlap of title I and title IV protections of electoral freedom may indicate "a legislative consensus that union members might need strong protections to deal with their unions."¹¹⁶

While the *Sadlowski* decision has suffered criticism, it has also received praise. These commentators focus on the union as an army with discipline and order needs that supercede individual liberties. As an army, "[t]he union must be able to maintain a unified front at crucial periods . . . to prevent employers from taking advantage of a split in the employees' ranks."¹¹⁷ Under this view, criticism of the union or its representatives "impairs the effectiveness of the officers and the prestige of the union."¹¹⁸ False claims against union officers "during organization, strikes, or bargaining can have disastrous consequences."¹¹⁹

The bases for these arguments for unity may also undermine the arguments for applying *Sadlowski* to union libel cases. As the Senate Labor Committee noted, a congressional grant of exclusive bargaining power carries with it responsibility to minimize abuses of power.¹²⁰ If unions crush

113. The original version of § 101(a)(2) called for the Secretary's enforcement. Hall, *supra* note 38, at 356.

114. See *infra* note 115.

115. Atleson, *supra* note 28, at 405. Labor Department enforcement of titles III and IV has not been energetic. Hall, *supra* note 38, at 356. Thus, the Kuchel version enhanced democratic guarantees through improved enforcement. *Id.* at 356-57. It is inconsistent with such reform to make the rights protected meaningless. Some Members of Congress supported the measure because private suits would accomplish the goal of limiting "federal interference with the internal affairs of labor unions." Local No. 82, Furniture & Piano Moving v. Crowley, 467 U.S. 526, 537 n.12 (1984). This development supports the *Salzhandler* court's conclusion that Congress had already struck the balance of individual and institutional interests when it adopted the LMRDA. *Salzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963). Professor Summers has noted that the final version of § 101(a)(2) balances congressional support for member rights and union autonomy:

The law, by protecting democratic rights within the union, not only adds to the members' freedom, but also reinforces the union's claim to remain free, for its decisions are validated by the democratic process. The statute does not open the door to further intervention but rather safeguards autonomy by giving union self-government added legitimacy.

Summers, *supra* note 6, at 300.

116. Note, *supra* note 110, at 200. It makes more sense to view titles I and IV as partially duplicative than to view them as inconsistent.

117. Comment, *supra* note 88, at 836; see also Note, *supra* note 3, 388 n.33.

118. Sigal, *supra* note 56, at 373.

119. Atleson, *supra* note 28, at 459.

120. S. REP. NO. 187, *supra* note 4, at 8, reprinted in 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2324.

diverse viewpoints and tyrannize their members¹²¹ they may silence insurgents only to allow the institution to suffer a more serious loss of support in a crisis.¹²² As one commentator has noted, democracy has seldom slowed the army in a crisis.¹²³ Until unions support the view that union democracy detracts from their ability to negotiate better contracts for their members, their objections to worker freedoms do not persuade.¹²⁴

In the aftermath of *Sadlowski*, the *Salzhandler* broad view of member rights has not lost its support among the lower federal courts. Two years after *Sadlowski*, the Second Circuit again considered the section 101(a)(2) protection of slander and held it was protected by the LMRDA bill of rights.¹²⁵

*B. Slander and Libel After Sadlowski: Applying the
Salzhandler Principles*

In *Petramale v. Local No. 17 of Laborers International Union*,¹²⁶ the Second Circuit reviewed union disciplinary action against a member who made slanderous accusations against the union.¹²⁷ The union's trial board found Petramale guilty, fined him \$1500, and barred him from meeting attendance for ten years.¹²⁸ The court reiterated its opinion that "criticism of union officers, even when it amounts to slander, is protected speech under the LMRDA."¹²⁹ The *Petramale* court recognized union authority to adopt reasonable rules, but it barred discipline unless a member actually disrupted a meeting.¹³⁰ The court found that the union had disciplined Petramale for his criticism, not his disruption of the meeting, making his words "an indis-

121. Atleson, *supra* note 28, at 459.

122. Hall, *supra* note 38, at 365. "Protected in its democratic rights, an insurgent rank-and-file may yet save and revitalize the labor movement. But if its rights are crushed under bureaucratic oppression neither it nor any other force can keep the unions alive." *Id.*

123. Hartley, *supra* note 5, at 95.

124. *Cf. id.* at 101 ("[T]he objections to union democracy and governmental intervention fail to establish its undesirability.").

125. *Petramale v. Local No. 17 of Laborers Int'l Union*, 736 F.2d 13 (2d Cir.), *cert. denied*, 469 U.S. 1087 (1984).

126. *Id.*

127. Petramale called union elections "corrupt and fixed" and accused union officers of causing violence at union meetings. *Id.* at 15.

128. *Id.* at 16.

129. *Id.* The court went on to hold that "when union discipline is imposed on the basis of a combination of factual allegations an essential element of which is protected speech, the discipline as a whole is invalid under the LMRDA." *Id.*

130. *Id.* at 17. The court remarked that election disputes "fraught with tension" could be expected to erupt in angry and incautious speech. *Id.* The union's reasonable interests in maintaining order and discipline at meetings did not justify discipline based on members' criticism. *Id.*

pensable element" of the charge.¹³¹ As a result, the court voided the penalties imposed. The court never referred to *Sadlowski's* interpretation of the section 101(a)(2) proviso.

The United States District Court for the District of Columbia, in *Nelson v. International Association of Bridge, Structural and Ornamental Iron Workers*,¹³² also upheld the broad view of section 101(a)(2) and cited both *Petramale* and *Sadlowski* in the same decision.¹³³ In *Nelson*, the court granted summary judgment to a member disciplined under a union constitutional provision designed to "prevent scurrilous attacks on the reputation of union officials."¹³⁴ The court acknowledged that Congress intended the LMRDA "to inject a *minimal* amount of democracy into union politics"¹³⁵ but upheld the broad view of the section 101(a)(2) protections that would protect even malicious libel.¹³⁶ Similarly, in *Rivera v. Feinstein*,¹³⁷ the United States District Court for the Southern District of New York recognized *Petramale* as "well settled law."¹³⁸ Examination of other post-*Sadlowski* libel and slander cases does not explain the apparent conflict between *Salzhandler* and *Sadlowski*. Nevertheless, the cases may be distinguished.

Two factual distinctions between *Sadlowski* and *Salzhandler* suggest that *Sadlowski* does not overrule *Salzhandler* and its progeny. First, *Sadlowski* did not involve union regulation of member speech protected by section 101(a)(2). The LMRDA bill of rights extends its guarantees only to members.¹³⁹ Yet in *Sadlowski* the "speaker" whose voice is silenced is the non-member whose political contribution influences union affairs.¹⁴⁰ As the union argued, Congress intended to protect members' speech even if they offered it outside the union's hall, "[b]ut it does not follow from the fact that Congress sought to free union members to discuss union affairs with their 'neighbors' that Congress also sought to grant these 'neighbors,' i.e., non-members, the right to participate in the election of the union's officers."¹⁴¹

131. *Id.* at 18.

132. 680 F. Supp. 16 (D.D.C. 1988).

133. *Id.* at 21, 23.

134. *Id.* at 21.

135. *Id.* at 22 n.7 (emphasis added).

136. *Id.* at 21.

137. 636 F. Supp. 159 (S.D.N.Y. 1986).

138. *Id.* at 162.

139. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1982); see also Comment, *supra* note 88, at 840 (arguing the *Sadlowski* Court need not have reached the proviso prong of its analysis).

140. See *Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (per curiam).

141. Petitioner's Brief for a Writ of Certiorari at 19 n.28, *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) (No. 81-395) (LEXIS, Genfed library, Briefs file). The ban on non-member contributions did not restrict a member's associational rights because nonmembers could still provide support and advice to their candidate.

Political contributions express the contributor's views by affecting "the number of issues discussed, the depth of their exploration, and the size of the audience reached,"¹⁴² while the candidate's speech is his "transformation of contributions into political debate."¹⁴³ The union rule in *Sadlowski* arguably did not restrict the candidate's right to transform monies received, because it focused only on the contributor's act of communication. If the *Sadlowski* Court incorrectly treated the nonmember's speech under section 101(a)(2), its discussion of the proviso may not apply to other free-speech cases. "By definition, a proviso only excepts conduct prohibited by the main provision; if the conduct does not fall within the main provision, an exception is unnecessary."¹⁴⁴

Additionally, *Salzhandler* involved content regulation because the union disciplined members only for "'conduct *unbecoming* a member,' " "'acts *detrimental* to' " union interests, and "'libeling and slandering' " members or officers.¹⁴⁵ The union made no content-neutral accusations against *Salzhandler*. As the Second Circuit noted in *Petramale*, the LMRDA permits reasonable rules against disruption of meetings, but prohibits application of rules against slander or critical speech.¹⁴⁶ This situation contrasts sharply with the one in *Sadlowski* where the union limited all nonmember contributions without reference to their content.¹⁴⁷

Several courts have decided content-regulation issues with similar concern that the union rule apply neutrally to supportive as well as critical member speech. The United States District Court for the Southern District of New York, which applies *Salzhandler* and *Petramale* in libel and slander cases,

142. *Buckley*, 424 U.S. at 19. The *Buckley* Court determined that federal election contribution limitations do not significantly hinder public debate. *Id.* at 29. Of course, the Court considered the rights of eligible voters, not of nonmembers, ineligible to debate or vote on union matters.

143. *Id.* at 21.

144. Comment, *supra* note 88, at 840.

145. *Salzhandler v. Caputo*, 316 F.2d 445, 446 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963) (citation and footnote omitted) (emphasis added).

146. *Petramale v. Local No. 17 of Laborers Int'l Union*, 736 F.2d 13, 17-18 (2d Cir.), *cert. denied*, 469 U.S. 1087 (1984).

147. See generally *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982). In *Buckley v. Valeo*, the Court described federal election contribution limits as neutral to "the ideas expressed by persons or groups subject to its regulations." 424 U.S. 1, 17 (1975) (per curiam). The Court hesitated to invalidate "evenhanded restrictions," *id.* at 31, "[a]bsent record evidence of invidious discrimination." *Id.* As in *Sadlowski*, the *Buckley* Court noted that incumbents sometimes lose to minority challenges. *Id.* at 32; see also *United Steelworkers v. Sadlowski*, 457 U.S. 102, 113-14 (1982). One distinction between *Buckley* and *Sadlowski* is that the *Buckley* Court recognized that the contribution limitation aids minority-party challengers. 424 U.S. at 33. It is not seriously contended that a nonmember contribution ban helps challengers based on the superior staff and resources available to incumbents in the union context.

nevertheless applied the *Sadlowksi* two-part analysis in *Roman v. New York State United Teachers*,¹⁴⁸ to uphold a union rule barring political advertisements in its union newspaper.¹⁴⁹ The plaintiffs objected under section 101(a)(2) to the union's refusal to run their advertisement, urging the union to "support [nonintervention] in Nicaragua."¹⁵⁰ In applying the *Sadlowksi* test, the court noted that the "advertisement has no relationship to any interest of the union or its members, but rather concerns an issue of international politics."¹⁵¹ Additionally, the union's policy avoided divisive controversy on nonunion matters.¹⁵² Thus, as in *Sadlowksi*, the court upheld the "partial interference with . . . speech" based on its reasonableness.¹⁵³

The Sixth Circuit applied strict scrutiny analysis to overturn a union's decision not to publish an advertisement opposing union-supported ratification of a contract. In *Knox County Local, National Rural Letter Carriers' Association v. King*,¹⁵⁴ the court required the union to publish a dissenting view even though application of first amendment theory would not require a newspaper "to publish any information submitted by an outsider."¹⁵⁵ The fact that distinguishes *Knox County* from *Roman* was the Sixth Circuit's finding that the union newspaper had based its decision on the critical content of the advertisement.¹⁵⁶ The decision in *Knox County* also emphasized the need to apply first amendment principles rather than the entire body of first amendment law.¹⁵⁷ This view of section 101(a)(2) comports with the broad view of section 101(a)(2) in *Salzhandler*.¹⁵⁸ These holdings and the holding in *Sadlowksi* seem to indicate that section 101(a)(2)'s proviso permits the union to adopt reasonable, content-neutral restrictions on union member speech. If that interpretation is valid, it is not inconsistent with *Salzhandler*'s view of section 101(a)(2), which protects critical speech even if it would be unprotected under the first amendment. If *Sadlowksi* addresses only content-neutral regulation of speech and courts continue to apply it narrowly, the result in *Sadlowksi* may be consistent with *Salzhandler* despite the broad sweep of the reasoning in *Sadlowksi*.

148. 655 F. Supp. 422 (S.D.N.Y. 1987).

149. *Id.* at 424-25.

150. *Id.* at 423.

151. *Id.* at 424.

152. *Id.*

153. *Id.* at 425.

154. 720 F.2d 936 (6th Cir. 1984).

155. *Id.* at 939.

156. *Id.* at 940.

157. *Id.*

158. Compare *id.* at 938-39 with *Salzhandler v. Caputo*, 316 F.2d 445, 448-49 (2d Cir.), cert. denied, 375 U.S. 946 (1963).

IV. CONCLUSION

The National Labor Relations Act gave labor unions an exclusive franchise to negotiate contracts for employees. In passing the Act, Congress recognized that individual employees lacked the economic power to otherwise protect their interests. Unions have argued that effective discharge of their responsibilities requires them to act as a unified body, free from the negative influences of dissenters and critics. As a result, unions adopted provisions that prohibited many expressions of criticism and dissent by members. Faced with mounting evidence of undemocratic practices and corruption,⁷ Congress passed a bill of rights for union members. The 1982 decision in *United Steelworkers v. Sadlowski* has threatened the dissenters' freedoms under the LMRDA by employing a rational basis test in reviewing union discipline. Despite the ominous portent of this decision, courts continue to protect even the malicious, libelous speech the first amendment does not protect. In doing so, these courts recognize that, absent such protection, unions' discipline might silence critics and compromise the values the exclusive bargaining authority ought to protect.

Despite the apparent threat of the *Sadlowski* decision, its precedential value for cases involving members' dissent may be limited. Its facts involved the content-neutral regulation of nonmember speech. Under the circumstances, its holding may have limited relevance to section 101(a)(2) cases. Nevertheless, its explicit interpretation of the section's proviso looms over all criticism and dissent within unions. The Court needs to clarify its holding to guarantee members the freedom from reprisal Congress intended the LMRDA to provide them.

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